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The Preventive Turn in Criminal Law

HENRIQUE CARVALHO

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THE PREVENTIVE TURN IN CRIMINAL LAW

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Para minha família, com amor.

General Editor's Preface

This volume throws down a challenge to traditional methods of thought about the criminal law. At a time when the principles of criminalization are much analysed and when features of the 'preventive turn' in criminal law are strongly opposed, this monograph examines the values that allegedly underlie the criminal law (notably, autonomy and liberty) and shows how in practice they tend to operate in tension with concerns about how that liberty is exercised by others, concerns which result in an emphasis on risk, security, and prevention. It is argued that the subject of criminal law is characterized both as an autonomous agent and as potentially dangerous, one of several dichotomies that represent a challenge to liberal criminal law theory. The flow of Henrique Carvalho's argument draws the reader towards the case for re-engineering established concepts such as subjectivity and responsibility so as better to reflect the human condition and its political locus. Indeed, a substantial part of the reasoning derives from detailed discussion of the political philosophies of Hobbes, Locke, Hegel, and Bentham, while keeping the reader in touch with examples that demonstrate the difficulties that traditional criminal law theory encounters in supplying justifications for swathes of our current criminal laws. This is a timely and important book, marking a significant step in debates about the philosophy of criminal law.

Andrew Ashworth

Foreword

In *The Preventive Turn in Criminal Law*, Henrique Carvalho takes a critical and dialectical view of how criminal law contributes to its own unravelling, acting, as he puts it, as a 'gateway to its own insecurity'.[1] In an analysis that is both historical and contemporary, he reviews the deep structures of the law to show how these undermine the normative claims of modern criminal justice and lead it in directions it thought itself against.

If the criminal law is a central element in the modern Western conception of a civil society,[2] it is in significant part because of the legitimative claim that its abstract legal subject delivers justice as it achieves security.[3] Delivering justice is itself a means of providing security, but security is a value in its own right.[4] Criminal law is thus founded on, and must negotiate the relationship between, these terms. The law's aim is at once to punish the responsible subject and to render society safe by controlling dangerous behaviour. The responsible subject is seen both as rational and responsible, and as capable of dangerous irresponsibility. Hence the law's plural approach to criminal liability in terms of character, risk and outcomes as well as capacity and opportunity.[5] Welcome to the contradictory problematic of the criminal law, in which criminal justice assumes different shapes and balances in different historical settings. The complex of criminal law and justice terms, its architectonic,[6] will shift its shape as the context changes. Yet, what emerges in one period or another is just as much a variant on the basic structure of the law.

Consider the difference between mid- and late nineteenth century arrangements, or the transition from a criminal justice system located in a post-war welfare state-based settlement to today's neo-liberal state of insecurity and fracturing community. Carvalho's argument, developed through telling and acute analysis of writing in the field,[7] is that these are all recognizable possibilities within the structural logic of criminal justice. The shift from one

[1] See p. 187 below.

[2] L. Farmer, *Making the Modern Criminal Law* (Oxford: Oxford University Press, 2016).

[3] A. Norrie, *Crime, Reason and History* third edition (Cambridge: Cambridge University Press, 2014).

[4] P. Ramsay, *The Insecurity State* (Oxford: Oxford University Press, 2007).

[5] N. Lacey, *In Search of the Responsible Subject* (Oxford: Oxford University Press, 2016).

[6] A. Norrie, *Justice and the Slaughter Bench* (Abingdon: Routledge GlassHouse, 2017).

[7] See for example the reading of arguments by Jeremy Horder in Chapter 1, or Antony Duff in Chapter 6, as well as the modern classical writers in Chapters 3–5.

to another is enabled by the nature of the criminal law, so that seemingly opposed positions betray underlying commonalities. Thus if we take debates today in which a 'neo-classical' liberal approach[8] seeks to mount a critique of the security state's preventive practices, we should recognize the ways in which that approach concedes the ground for new 'anti-liberal' forms at the same time as it seeks to criticize them. There is no pleasure in the sense of a 'form of life that is now grown old', for people get badly hurt in the process. Carvalho wants to think creatively about what would be needed for a more progressive direction in law and politics; but he also wishes to be clear about the state we are in.

In what sense is this a critical and dialectical account? Briefly, there are three different elements. The first is the claim that criminal law works with conflicts *intrinsic to it*, that it never resolves. The responsible subject is one who has nonetheless acted irresponsibly; it involves an agent who is in control, yet needs controlling. This is a dialectical tension in the legal subject which stems from its abstract universal form. Responsibility and control are asserted in abstraction from the real world settings in which the subject acts. Yet these are crucial to understanding how responsible agency is exercised and might be controlled. The resulting process of abstraction and reinsertion is at the core of the law's deep structure.

The second element might be expressed by seeing dialectics as 'the art of thinking the coincidence of distinctions and connections'.[9] This is particularly helpful in terms of thinking about the legal subject and the changing shape of the criminal law. In the setting of the post-war, welfare-based criminal law, the choosing subject with capacity and fair opportunity to do otherwise[10] played the important role of *distinguishing* the remit of the criminal law from a variety of alternative means of control, including ideas of psychological causation, criminogenic social relations, character and individual dangerousness, extended moral affect, and potentials for future risk. The distinction was solid enough in that social, political and economic context to keep at bay the connections to other aspects of crime. Now, in the time of the neo-liberal, authoritarian, security and prevention-based state, the ways in which criminal justice discourse distinguishes and connects its different aspects must be reassessed. In the current feverish political climate, it is tempting to wonder where it will go next.

Finally, this brings us to a third element, the idea of a phenomenology of criminal justice forms. By this, Carvalho means a method of 'examining a

[8] Lindsay Farmer's term (note 2).
[9] R. Bhaskar, *Dialectic: the Pulse of Freedom* (London: Verso, 1993).
[10] H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon, 1968).

concept through the relation between the ways it is idealized and imagined on the one hand, and ways it is actualized and concretely developed on the other'.[11] Literally, the term denotes a study of appearances, and in the way he uses it, I think Carvalho wants especially to express how forms have their own (phenomenal) reality in the world, but also reflect and express an underlying structure as it emerges, moves and shifts shape in different historical periods. He is influenced by Hegel, who appears in various parts of the book as both a source of support and an object of critique. The stress on history and the deep structure of law, which underlie the twists and turns in criminal justice, is central to Carvalho's phenomenology. Together with the lack of a higher level resolution of the problems of justice, these aspects at once point to the debt to Hegel and the critical distance from him (in the direction of modern critical dialectics).[12] Ultimately, Carvalho's commitment to a broad politics of recognition affirms the possibility of an ethics, and attendant social and legal forms, which could unify humanity. Yet his understanding of history, the structural violence of modernity, and the relation of both to modern criminal justice indicates the ethically broken nature of the present.

This fine book is the latest in a number of recent critical works on criminal law. Carvalho has been able to draw on these to pull together themes from this phase of critical legal thinking. It is fitting that this should be done by a member of the new generation of scholars, and it will be interesting to see how things develop further. With its solid base in modern classical political philosophy and its acute intelligence for critical engagement, this is a well-grounded and important work at an important time. In a world in which authors ask if the criminal law is a 'lost cause',[13] or predict its end,[14] Carvalho's argument needs to be heard.

Alan Norrie

[11] See p. 19 below.
[12] For example, Roy Bhaskar, Charles Taylor, and Alexandre Kojeve all feature in the text.
[13] A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225.
[14] R. Erickson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007), 213.

Preface

This is not a legal book. It is certainly a book about the law; but the aim of this work is precisely to conceive the law as a socio-political phenomenon, as something inextricably linked to the ways in which our societies are imagined, and in which we experience social relations, norms, and institutions. In this sense, *The Preventive Turn in Criminal Law* is the theoretical pursuit of a phenomenology of law. More specifically, what I mainly strive to do in this book is to make a case for the need for such phenomenological work, by examining how concepts and ideas within criminal law conceal problems and complexities which can only be adequately investigated if coupled with an awareness of their intrinsic social and political dimensions. The criminal law can only be understood through its relation with the function it performs in society and the place it has in the political constitution of that society. And in this relation, what I found is that the main aspect of the criminal law is also phenomenological, in that its main purpose is to shape and condition, to regulate and control, our socio-political experience.

The argument of the book, in a nutshell, is that what came to be known as the preventive turn is a direct consequence of a tension which lies at the core of liberal society and which is expressed through its law. This is a tension between the intrinsic value given to individual freedom and to the worth of human beings, and the perceived need to curtail and limit that very same freedom in the name of security. Ultimately, then, the idea of individual autonomy and liberty which is seen to be the cornerstone of liberal societies is intrinsically ambivalent, in that it espouses two contradictory normative positions in the way these societies are imagined: individual freedom is the primary purpose of society, and it is also the primary threat to it. I theorize and examine the ambivalence of individual freedom in three different levels throughout the book.

The first level is that of legal theory. Especially in Chapters 1, 2, and 7, I look at the ways in which the criminal law has been conceptualized and interpreted, in order to show how it both conceals and espouses a fundamental ambivalence with regards to its subject. I define this ambivalence as preserving a dialectic relation between two contradictory notions, that of responsibility and that of dangerousness. The subject of criminal law is thus composed of two dimensions, one in which s/he possesses a semblance of responsibility, and is approximated to the image of a law-abiding citizen of

the community, and one in which s/he resonates with an idea of danger, of a potential threat to society. And since the criminal law is both about expressing the responsibility and repressing the dangerousness of its subjects, its justificatory framework is torn between the need to respect autonomy and the need to promote security, so that the same normative structure is found to be able to legitimate the so-called liberal model of criminal law as well as the excessive authoritarianism of the preventive turn.

The second level of analysis is that of political theory. Here, the ambivalence of the subject of criminal law is revealed as a political condition. It is essentially born out of a model of society which is meant to both promote socio-political equality and to preserve structural and ideological conditions of pervasive and often intense inequality. The main function of the criminal law in this political project is to maintain civil order, a specific form of social order which encapsulates the emancipatory promise and the structural violence of modernity together, repressing this political conflict through notions such as civilization and civility. The criminal law maintains civil order by means of a dialectic relation between individual autonomy and political authority. In this relation, individuals whose autonomy is in league with the public interest expressed by the state find themselves deemed trustworthy and reassured by the security provided by criminalization and punishment, while those whose autonomy is found at odds with the interests of the community are conceptualized as dangerous others, and forcibly restrained or removed from the community altogether. Chapters 3, 4, and 5 are dedicated to tracking the conceptual foundations of this dynamic relation in the history of political thought, through a deep engagement with the political theories of Thomas Hobbes, John Locke, and G.W.F. Hegel. In critically analysing these classic works, I elaborate a theoretical perspective which I deploy in order to expose reproductions of the same problematic logics, both in liberal thought in general—illustrated primarily through the work of Jeremy Bentham and his disciple, John Stuart Mill—and in liberal criminal law in particular.

The third level of investigation is based on social theory. Throughout the book, and particularly in Chapters 2, 6, and 7, I scrutinize the meaning and consequences of this political conflict expressed through criminal law to the ways in which we experience and imagine society. I therefore conceptualize the ambivalence of the subject of criminal law as having an intrinsic relation to social inequality, and the political and legal repression of this ambivalence as deeply connected to conditions of insecurity and anxiety in contemporary social life. In this level of analysis, the preventive turn represents the radicalization of the political conflict at the heart of liberal society, and the exposure of the limits of the liberal project in criminal law. Especially in Chapter 6, I rely on a critical theory of recognition in order to examine the limits of this

emancipatory ideal in liberal law, and look for a possible pathway to move beyond such limits.

In the end, this book constitutes an attempt to pursue, through criminal law theory, a serious engagement with the contemporary challenges and perplexities surrounding the human condition in liberal societies. I can only hope that, in talking about the law from the perspective of political and social thought, I may have contributed to making legal thought a more social, political, and critical affair.

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This monograph started its life as a PhD thesis, which was generously funded by the School of Law at King's College London. I would like to thank Alan Norrie and Penny Green for the encouragement and guidance which they offered me throughout my doctoral research as supervisors. Alan, in particular, has been a mentor, a source of inspiration, and an invaluable colleague ever since, who taught me to trust my own instincts and to value my ideas. For that I am incommensurably grateful. I would also like to extend my gratitude to Andrew Ashworth for taking this book into the Oxford Monographs on Criminal Law and Justice series, and to Alex Flach, Natasha Flemming, Elinor Shields, Eve Ryle-Hodges, and everyone else at Oxford University Press, who helped make this book a reality.

I am greatly indebted to Nicola Lacey and Lindsay Farmer, who took the time to read and examine this work when it was a thesis, and who since then continued to offer their advice and support, without which this book would probably not have been written. Furthermore, I am obliged to Peter Ramsay and Craig Reeves for the valuable feedback on several chapters of this book, and for the lively discussions in our research group. Their eagerness to engage with this project, as well as their thoughtful and friendly advice, contributed to making this a much more enjoyable and enriching experience. I would also like to offer my sincerest gratitude to John Charney, Sabrina Gilani, Thomas Goldup, and Stefan Mandelbaum for our intellectual exchanges, which maintained the perfect harmony between rigorous criticism, honest encouragement, and warm friendship. In addition, I would like to thank Stephen Anderson, Isra Black, Melanie Collard, Lisa Forsberg, Laerson Guilherme, Emmanuel Melissaris, Harry Nikolaidis, Can Öztaş, Federico Picinali, Thiago Sales, and Josué Santiago for their friendship and support.

Draft versions of parts of this monograph were discussed at a number of seminars and read by several people, and I am grateful for all the comments and criticisms I received, as well as for the patience offered to me. I am especially thankful for the feedback I received from colleagues at the Institute of Global Law and Policy workshops at Harvard Law School, at the Criminal Law and Criminal Justice Theory seminar at the LSE, at the Birkbeck Law School seminar, at the Readings and Reflections seminar at the University of Warwick, at the PUC Valparaiso criminal law and legal theory seminar, and at the Congreso sobre Derecho y Cambio Social at the Universidad Austral de Chile.

The text of this book borrows material from work that I previously published. Chapter 3 draws extensively on the article 'Liberty and Insecurity in the Criminal Law: Lessons from Thomas Hobbes' (2015) *Criminal Law and Philosophy* (Online First), 1–23, while Chapter 6 draws on the discussion first published in 'Terrorism, Punishment, and Recognition' (2012) 15(3) *New Criminal Law Review*, 345–74. I am obliged to the editors and anonymous reviewers involved in the publication of these pieces, as well as to those who anonymously reviewed the proposal for this book.

Finally, I would like to thank Alexandre da Costa Carvalho, Erika Carmen Randau, Marcela Randau Carvalho-Burgess, and Cleide Venâncio Lopes for their love, unending support, and unflinching reassurance, and Anastasia Chamberlen for sharing with me the best years of my life, opening my world to a deeper truth about emotions and teaching me the real meaning of happiness. Reflecting at the end of this journey, I have only a lot to be thankful for, and nothing to regret.

Contents

1

Setting the Problem

Liberal Criminal Law and the Preventive Turn

We are witnessing the end of criminal law.[1]

The world in the beginning of the twenty-first century appears to be full of risks and violent threats. The notion of terrorism has changed from a localized and exceptional danger to an almost quotidian event, something against which we must be constantly guarding ourselves. In addition, at the present moment we are still dealing with the consequences of an ongoing economic crisis, which is itself intermeshed with one of the most significant geopolitical crises in recent times, in which a multitude of wars, socio-economic challenges, and political uprisings clash with the largest displacement of populations since the Second World War. The other side of this condition of living in an environment of constant flux and uncertainty is the experience of accentuated feelings of insecurity and anxiety.[2] This state of insecurity has had significant implications for the framework of criminal law. On the one hand, this general atmosphere often translates into a heightened sense of vulnerability with regards to crime.[3] On the other, and because of this, the criminal law is seen as one of the main instruments which the state possesses in order to address these many concerns. As a result, for the last couple of decades, a predominant focus on security and public protection has been identified in the legal and political spheres of many liberal democratic countries, and especially in the United Kingdom and the United States.[4] In England and

[1] R. Ericson, *Crime in an Insecure World* (Cambridge: Polity Press, 2007), 213.

[2] See A. Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991); U. Beck, *Risk Society: Towards a New Modernity* (London: Sage, 1992); N. Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999).

[3] See Ericson, *Crime in an Insecure World*; P. Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford: Oxford University Press, 2012).

[4] See D. Husak, *Overcriminalization* (Oxford: Oxford University Press, 2008); B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance* (Portland: Hart, 2009); R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros (eds), *The Boundaries of the Criminal Law* (Oxford: Oxford University

Wales, the outcome of these efforts has been an unprecedented expansion of the boundaries of the criminal law and its framework of criminal liability, manifested through the proliferation of criminal offences and of far-reaching powers of surveillance and crime control. From terrorism and serious violence, through cybercrime and pornography, to anti-social behaviour and immigration, the liberal state has left virtually no stone unturned in its efforts to secure what is increasingly being seen as an anxious public and a fragile social order.

These developments are particularly problematic to the liberal project in criminal law and justice. The criminal law, as far as legal theory is concerned, is at a turning point. Recent changes to the framework of criminal justice and criminalization have brought forward significant challenges, not necessarily to the importance of criminal law per se—in many respects, it is increasingly seen, and used,[5] as an essential element of law and governance in contemporary society—but mainly with respect to its legitimacy as a modern, liberal institution.[6] Underlying this preoccupation is the idea that what is most distinctive about modern criminal law and punishment, what sets them apart from pre-modern and pre-liberal exercises of penal power, is their concern with individual justice; that is, with providing for a system of criminal justice that treats individuals with respect.[7] The cornerstone for this conception is the image of individuals as responsible subjects who are not only able but also entitled to live their lives according to their own plans and reasons, and thus that it is necessary for the law to respect them as such. This 'alignment of law and morality around the model of individual choice and responsibility'[8] is a core tenet of liberal criminal law thinking, and seen as the corollary for the justification of the state's power to punish.

What is particularly challenging about the present moment in liberal societies, and particularly in England and Wales, is that the contemporary concern

Press, 2010), *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011), *The Constitution of the Criminal Law* (Oxford: Oxford University Press, 2013), and *Criminalization: The Political Morality of the Criminal Law* (Oxford: Oxford University Press, 2014); A. Ashworth, L. Zedner, P. Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013); A. Ashworth, L. Zedner, *Preventive Justice* (Oxford: Oxford University Press, 2014).

[5] A. Ashworth, L. Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2 *Criminal Law and Philosophy*, 21–51, 38.

[6] See A. Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review*, 225–56; Husak, *Overcriminalization*; L. Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016).

[7] See D. Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot: Gower, 1985).

[8] A. Norrie, *Punishment, Responsibility, and Justice* (Oxford: Oxford University Press, 2000), 2. See also L. Farmer, *Criminal Law, Tradition and Legal Order* (Cambridge: Cambridge University Press, 1997), chapter 1.

with security appears to have given so much importance to the need for criminal law to effectively prevent crime, that this preventive function has been prioritized over the promotion and protection of individual justice upheld by liberal legal theory.[9] From this perspective, then, this preventive turn[10] stands against the main justificatory framework available to criminal law and justice in these societies, bringing either the legitimacy of contemporary criminal law or, perhaps, the validity of the justificatory framework itself, into question. But although there is little doubt that the contemporary condition of criminal law and justice is problematic, there is a risk that the novelty and specificity of the preventive turn might be overstressed. In other words, paying too much attention to what is deemed to be new or different about the contemporary emphasis on prevention might distract us from the extent to which the issues currently faced by liberal criminal legal systems might also be related to enduring aspects of these systems themselves. Perhaps the problem of prevention is not only a challenge to liberal law, but mainly a problem that liberal law has brought upon itself.

This book presents an effort to bridge this gap between a theoretical understanding of the preventive turn and a critical analysis of the liberal project in criminal law. For this purpose, I examine the issues around the rise of preventive criminal offences through an engagement with the conceptual foundations of liberal criminal law, tracing the theoretical development of specific ideas which lie at the core of the liberal legal project, while contrasting this development with the legal and socio-political context in which they were embedded and actualized. The main postulate I advance in this analysis is that the idea of individual autonomy and liberty—together with its main manifestation in the framework of criminal law, the notion of criminal responsibility—can be used as the main lens through which to understand not only the problems surrounding the liberal project in criminal law, but also the challenges presented to this project by the preventive turn. The main question I explore considers how to conceptualize individual liberty and autonomy, as well as the liberal idea of society grounded upon these concepts, and how to trace the conceptual genealogy of these notions. In order to address this

[9] See A. Ashworth, L. Zedner, 'Just Prevention: Preventive Rationales and the Limits of the Criminal Law' in R.A. Duff, S.P. Green (eds), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 279–303.

[10] See G. Hughes, *Understanding Crime Prevention: Social Control, Risk and Late Modernity* (Maidenhead: Open University Press, 2000); A. Crawford (ed), *Crime Prevention Policies in Comparative Perspective* (Cullompton: Willan Publishing, 2009); L. Zedner, 'Fixing the Future? The Pre-emptive Turn in Criminal Justice' in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance* (Portland: Hart Publishing, 2009), 35–58; N. Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (Oxford: Oxford University Press, 2016).

question, I pursue throughout the book a methodological perspective which intentionally distances itself from legal doctrine, seeking the aforementioned genealogy of ideas which ground the framework of criminal law outside of its institutional confines, focusing on works of social and political theory. In doing so, however, I hope to uncover aspects of the law that a purely or a mainly legal perspective would otherwise tend to neglect.

This initial chapter introduces the context of the preventive turn, looking at how it is represented in terms of doctrine and criminalization, and paying particular attention to how recent changes and transformations to the framework of criminal law and liability have been interpreted by criminal law scholars. I focus specifically on the comprehensive work on prevention undertaken by Andrew Ashworth and Lucia Zedner, which I take to be a paradigmatic example of liberal criminal law scholarship. Then, by engaging with this literature, I identify a certain tension around dichotomies found in criminal law theory, such as that between punishment and prevention, which suggests a paradoxical relationship between liberal law and arguably the central notion in its normative framework, that of individual autonomy and liberty. This tension leads to an ambivalent conception of the subject which lies at the core of criminal liability, which is not fully recognized by the liberal model but which is exposed by the preventive turn. The last part of the chapter lays out the methodological framework for the rest of the book, its main assumptions, and its overall structure.

THE PROBLEM OF PREVENTIVE CRIMINAL LAW

One of the main concerns of legal theorists examining the current moment in criminal law relates to understanding and defining the appropriate contours of the framework of criminal law.[11] The definition that arguably best encapsulates what appears to be the predominant interpretation of these boundaries is what Andrew Ashworth and Lucia Zedner have called the 'liberal model of criminal law'.[12] This model is grounded on 'a liberal conception of criminal justice that emphasises both the purpose of the criminal law in providing for censure and punishment and the need to respect the autonomy and dignity

[11] See for instance Duff et al, *The Boundaries of the Criminal Law*.

[12] Many references to what constitutes the liberal model of criminal law rely on the scholarship of Andrew Ashworth, either on his own work or on his rich collaboration with Lucia Zedner. This is in great part because Ashworth's work has managed to eloquently express a theoretical image of the criminal law that has become paradigmatic among contemporary criminal law scholars. For details on this perspective, see Farmer, *Making the Modern Criminal Law*.

of individuals in the criminal process'.[13] This normative demand of respect for the individual stems from the position of individual autonomy as 'one of the fundamental concepts in the justification of criminal laws', which maintains 'that each individual should be treated as responsible for his or her own behaviour'.[14] The subjective principle of responsibility which arises from this postulate legitimates the penal power of the state, by according 'individuals the status of autonomous moral agents who … can fairly be held accountable and punishable' for their wrongdoing.[15] At the same time, however, it also limits this power, by holding the retributive understanding that 'only those who have in some sense willed their own violation of the law should be punished, and … the punishment should be proportionate to the wrong'.[16] Thus although it recognizes that criminal law has a role in the maintenance of social order, the liberal model gives primacy to individual justice; so that the former aim should not be achieved at the latter's expense.

In addition, according to the liberal model, the primary focus of the criminal law should be on punishment, so that criminalization should concentrate on 'the censure … for past wrongdoing'.[17] One of the main reasons for limiting criminalization generally to instances of harm done is to allow space for individuals to exercise their agency, giving them the opportunity to act responsibly and only punishing them if they fail to do so. This perspective is thus also intrinsically linked to notions of responsible subjectivity, as to anticipate the harmful consequences of an individual's conduct through criminalization 'is to fail to treat the law's subjects as rational moral agents who are able to adjust their conduct to the law'.[18] This respect for autonomy is crystallized above all in the presumption of innocence, which is seen within liberal theory as 'the bedrock of the individual subject's, and more especially citizen's, independence of the state'.[19] This series of concerns, expressive of an emphasis on the

[13] Ashworth, Zedner, 'Defending the Criminal Law', 22.

[14] A. Ashworth, J. Horder, *Principles of Criminal Law* (Oxford: Oxford University Press, 2013), 23.

[15] I. Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems*, 213–49, 237.

[16] P. Ramsay, 'The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State' (2006) 69(1) *Modern Law Review*, 29–58, 31.

[17] Ashworth, Zedner, *Preventive Justice*, 96.

[18] P. Ramsay, 'Preparation Offences, Security Interests, Political Freedom' in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros (eds), *The Structures of the Criminal Law* (New York: Oxford University Press, 2011), 203–28, 217. For a criminological critique of preventive criminalization, see M. Hildebrand, 'Proactive Forensic Profiling: Proactive Criminalization?' in R.A. Duff, L. Farmer, S.E. Marshall, M. Renzo, V. Tadros (eds), *The Boundaries of the Criminal Law* (New York: Oxford University Press, 2010), 113–37.

[19] Ramsay, ibid.

moral significance of the individual, aligns the liberal model of criminal law with a perspective which 'purport[s] to take a restrictive, "minimalist" view of the justifiability of criminalisation'.[20] The bedrock of this view on criminalization is the idea that the 'paradigm form of substantive criminal offences' should be that of the ' "harm plus culpability" model',[21] which requires proof of both harm done and culpable wrongdoing, represented in offences such as murder and criminal damage. Although this model of offences also possesses the aim of preventing future harm, especially through the idea of deterrence through the communication of censure and the threat of punishment, its primary rationale is said to be punitive, not preventive.

In contrast with the liberal model, the justificatory framework embedded in the preventive turn, with its focus on the management of risk and insecurity,[22] seems to be grounded on a critique of, and disenchantment with, the minimalism and restraint championed by the liberal model, aligned with the sentiment that the aspirations upheld by this model are unrealistic and unrealizable and that, by placing too much emphasis on the redressing of harms, it hinders their actual prevention.[23] Reflecting this concern, many of the currently proliferating criminal offences have a predominantly preventive rationale. While some preventive criminal offences can be somewhat reconciled with a liberal conception of criminal law,[24] many of the offences enacted in the last couple of decades tend to criminalize conduct or circumstances that are so distant from the targeted harm that their connection to it can only be characterized as remote, established more on the basis of the risk or danger assumed to be inherent to these activities than on an actual link with the proscribed harm.[25] These offences have been termed 'pre-inchoate',[26] since they expand the scope of liability well beyond the traditional spectrum of inchoacy deemed acceptable by the liberal model.

Such offences include, among others, preparatory or mere preparation offences, possession offences, and offences linked to the breach of a preventive

[20] J. Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' in R. Sullivan, I. Dennis (eds), *Seeking Security* (Oxford: Hart, 2012), 79–102, 79.

[21] Ashworth, Zedner, *Preventive Justice*, 96.

[22] See Ericson, *Crime in an Insecure World*.

[23] See Horder, 'Harmless Wrongdoing'.

[24] For instance, it is commonly accepted that the traditional inchoate offences of attempt, conspiracy, and incitement (now replaced by the offences of assisting or encouraging crime in the Serious Crime Act 2007, ss. 44–50), as well as some crimes of 'endangerment' (see R.A. Duff, 'Criminalising Endangerment' in R.A. Duff, S.P. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press, 2005), 43–64), have their place in a liberal polity.

[25] See P. Ramsay, 'Democratic Limits to Preventive Criminal Law' in A. Ashworth, L. Zedner, P. Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford: Oxford University Press, 2013), 214–34.

[26] See Ramsay, ibid.